trial judge. The Federal Court, which lost no advantage because it did not see and hear the witnesses, was fully justified in reversing and indeed was bound to reverse the trial judge.

For the reasons indicated, their Lordships will advise His Majesty the Yang di-Pertuan Agong that the appeal should be dismissed. The appellant must pay the respondent's costs.

Appeal dismissed.

Solicitors: *Graham Page & Co.; Gasters.*

SINGAPORE REPORTS

KARL LJUNGBERG & CO. AB v. THE NETHERLANDS INSURANCE CO. EST. 1845 LTD.

[C.A. (Kulasekaram, Chua & Rajah JJ.) March 24, 1983]

[Singapore – Civil Appeal No. 23 of 1982]

Insurance – Marine insurance – Insured were consignees of goods lost or damaged – Denial of liability by insurers – Insured sued third party/owners of vessel in Japan – Whether insurers should indemnify insured for all legal costs incurred in actions in Japan.

Shipping Law – Marine insurance – Indemnity – Whether insurers should indemnify insured for legal costs incurred in actions against third party in Japan.

The appellants were consignees of goods shipped on M.V. "Mammoth Pine" and which were insured under a marine insurance policy with the respondent insurers. On March 20, 1980, the said goods were found to be missing and/or damaged. The appellants claimed against the respondents under the said insurance policy. However, the respondents at first denied liability *in toto*. The appellants then commenced action against the respondent in Suit No. 850 of 1981 claiming damages in the sum of $64,140.68. In March 1981 the appellants commenced actions in Japan against the owners of the vessel and the charterers. The action (Suit No. 850 of 1981) against the respondents was discontinued in June 1982. The respondents, however, did not agree that they should indemnify the appellants for all the legal costs and disbursements as regards the said two actions in Japan, notwithstanding that the appellants' solicitors had suggested that the respondents might do so without prejudice to their denial of liability. The appellants contended that it was at the insistence of the respondents that they commenced the actions in Japan and that it was only right that the respondents should indemnify them for the costs.

The said insurance policy was subject to the Institute Cargo Clauses (All risks). Clause 9 thereof read:

"It is the duty of the Assured and their Agents, in all cases, to take out measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against the carriers, bailees are properly preserved and exercised".

The insured/appellants' application for an order that the defendants do indemnify the plaintiffs for all legal costs as regards the actions in Japan was disallowed by the High Court. The insured appealed.

Held, allowing the appeal: upon a reading of the correspondence which has passed between the appellants and the respondents the proper inference to be drawn was that the respondents had required the appellants to commence the actions against the third parties. The appellants commenced proceedings against the third parties not on their own initiative but on the insistence of the respondents and the appellants were entitled to invoke the said Clause 9 to throw liability for the costs of those actions on the respondents.

COURT OF APPEAL.

Woo Bih Li for the appellants.

K. Gopalan (*N.K. Pillai* with him) for the respondents.

Cur. Adv. Vult.

Chua J. (delivering the Judgment of the Court): This is an appeal from the judgment of the High Court on an Originating Summons in which the appellants (Plaintiffs in the Originating Summons) asked for the following:–

"1. An order that the Defendants do indemnify the Plaintiffs for all legal costs including but not limited to solicitor and client costs, and party and party costs and disbursements as regards the following actions in Japan:–

(a) Karl Ljungberg and Co. AB v. the Sanko Steamship Co. Ltd., the Tokyo District Court File No. Showa 56 (WA) 2606;

(b) Karl Ljungberg and Co. AB against Mammoth Bulk Carriers Ltd., the Tokyo District Court File No. Showa 56 (WA) 3034.

2. A declaration that the Plaintiffs shall be at liberty to discontinue and withdraw the actions referred to in paragraph (1) above and to *withdraw and* refrain from commencing any other action for the protection of the Defendants' interests without prejudice to the rights of the Plaintiffs to claim against the Defendants for loss of and damage to Phenol Film Faced Plywood insured under the Defendants policy of marine insurance number 1.21.77. 01916.80 dated February 6, 1980.

3. Costs.

4. Such further or other relief as this court thinks fit."

The respondents resisted the appellants' application.

The High Court granted an order in terms of

prayer 2 of the summons, but dismissed prayer 1 of the appellants' application and made no order as to costs.

The appellants were dissatisfied with the order dismissing the claim for an indemnity.

After hearing the appeal we allowed the appeal and now give our reasons.

The following facts were not in dispute. The appellants were consignees of Phenol Film Faced Plywood (the said goods) insured under the respondents' policy of marine insurance number of 1.21.77-0916.80 (the said insurance policy).

On or about March 20, 1980, some of the said goods were found to be missing and some were damaged as the said goods were being unloaded off the vessel "Mammoth Pine" at Esbjerg, Denmark. Accordingly, the appellants claimed against the respondents under the said insurance policy. The respondents denied liability *in toto*.

On January 15, 1981, the appellants' solicitors wrote to the respondents' solicitors, the relevant portion of the letter reads:

"It would seem that there is a *prima facie* case against your clients for the loss estimated at S$64,140.68. However, your clients have so far denied liability and have offered our clients, on a without prejudice basis, S$21,982.34 only. Meanwhile we believe that your clients may be under the mistaken impression that our clients are under a duty to preserve claims against third parties, for example, against the carrier by taking active steps such as the commencement of legal action against the carrier before the claim against the carrier is time-barred.

We hereby put you on notice that the duty to preserve claims against third parties by such active steps arises only when the right of subrogation attaches which right in turn arises only when your clients admit and pay the sum claimed by our clients.

Your clients will therefore have to decide whether they wish to continue to deny liability to ours or admit it and pay our clients accordingly.

Should your clients continue to deny liability, our clients will initiate legal action against yours and any other party which they choose, but our clients will not institute action in Japan against the carrier which action will be time-barred by March 19, 1981.

Should your clients decide to admit liability to ours and to claim against the carrier concerned, we would urge them to do so immediately since, as mentioned above, the action in Japan will be time-barred by March 19, 1981."

On January 16, 1981, the respondents' solicitors replied in these terms:

"As regards preservation of rights against carriers, if you would care to read closely the terms, conditions and the effect and meaning of the same under the Marine Cover Policy, you would note that the duty to preserve the said rights at all material times lies with your clients and is in no way affected by our clients' decision to admit or deny liability for a claim under the policy. In the premises, we reiterate the provisions of the policy and put your clients to notice of their contractual and legal obligations under the said contract of insurance."

On January 19, 1981, the appellants' solicitors replied:

"Furthermore, we feel that our courts will agree with us, on policy considerations if nothing else, that an insurer cannot, on the one hand deny liability and yet, on the other, expect the assignee to undertake an action at his own expense which action would be essentially for the benefit of the insurer."

The respondents' solicitors replied on the January 26, 1981:

"We have already stated that our clients deny liability to your clients' claim and therefore cannot see the relative merits in your subrogation argument. To put it quite succinctly:- "How can our clients commence an action against carriers when no subrogation is involved – in whose name will the action be commenced?" We are quite aware of what the outcome would be if this matter is litigated in our courts and can assure you that it would not be anything like what you are suggesting in your said letter."

The appellants' solicitors replied on January 28, 1981:

"It is precisely because we realise that your clients cannot commence any action against the carrier without the right of subrogation that we put you on notice that your clients will have to either (a) admit liability to our clients and enjoy the rights derived from subrogation OR (b) continue to deny liability to our clients and be denied the rights and privileges of subrogation.

Our letter of January 19, 1981 thus states that your client cannot deny liability to ours and yet claim to enjoy the rights of subrogation, one of which is the assistance of our client in initiating and thereby preserving a claim against the carrier.

Furthermore, the effect of an express term of the policy referring to the preservation of claims against other parties has already been elaborated upon by us.

Since your clients have failed to admit any liability to ours, we put your clients on notice that claims against the carrier or any other party will not necessarily be preserved by our clients initiating legal action against the carrier or other parties."

On January 28, 1981, the respondents' solicitors replied:—

"Regrettably, we must reiterate that our clients' position as to liability has not changed.

Our clients put your clients to notice that should your clients not preserve our clients' rights and interests in any event, on an entirely "without prejudice" basis, this would be an additional ground for our clients to deny liability under the policy. If an action is commenced against our clients, our clients will rely in their defence inter alia to the terms and conditions of the policy with your clients."

On March 18, 1981, the appellants commenced an action against the respondents in Suit No. 850 of 1981 claiming damages in the sum of $64,140.68.

In March, 1981, the appellants commenced actions in Japan against the owners of the vessel and the charterers which actions were as set out in the Originating Summons.

The respondents resisted the claim of the appellants in Suit No. 850 of 1981. First they applied to have the action stayed, alternatively to have the Statement of Claim struck out. They were unsuccessful.

In August, 1981, the appellants applied for judgment under Order 14. The respondents filed an affidavit resisting the application but in October, 1981, the respondents consented to judgment in the sum of $21,982.34 and were granted leave to defend the remaining sum of $42,158.34.

In March, 1982, the appellants took out the present Originating Summons. After that the parties came to a settlement and in June, 1982, the appellants discontinued the action against the respondents in Suit No. 850 of 1981.

However, the respondents did not agree that they should indemnify the appellants for all the legal costs and disbursements as regards the said two actions in Japan, notwithstanding that the appellants' solicitors had suggested that the respondents might do so without prejudice to their denial of liability.

The contention of the appellants was that it was at the insistence of the respondents that they commenced the actions in Japan and that it was only right that the respondents should indemnify them for the costs.

The contention of the respondents was that it was not right to say that actions in Japan were commenced by the appellants at their insistence. The respondents said that they were non-committal and had left it to the appellants to decide.

The said insurance policy is subject to the Institute Cargo Clauses (All risks) and clause 9 thereof reads:

"9. It is the duty of the Assured and their Agents, in all cases, to take out measures as may be reasonable for the purpose of averting or minimising a loss and to ensure that all rights against the carriers, bailees or other third parties are properly preserved and exercised."

The purpose of this clause is to ensure that an insured does all that he should to enable the insurer to receive the benefit of any rights and remedies which the insured himself might possess against third parties. This condition manifestly is one inserted to aid the insurers, not the insured.

In our opinion the clause does not place any obligation on the insured to take proceedings against third parties unless the insurer has called upon the insured to perform its obligation thereunder. It is only in the event of such requirement that action to enforce rights against a third party is necessary, that such action by the insured is at the expense of the insurer.

In our view upon a reading of the correspondence which had passed between the appellants and the respondents the proper inference to be drawn was that the respondents had required the appellants to commence the actions against the third parties. The appellants commenced proceedings against the third parties not on their own initiative but on the insistence of the respondents and the appellants are entitled to invoke clause 9 to throw liability for the costs of those actions on the respondents.

For these reasons we allowed the appeal.

Appeal allowed.

Solicitors: *Allen & Gledhill; Niru & Co.*